Likewise, I placed the defendant and her husband's testimony under close scrutiny for the same reason. However, I found support for the defendant's case in Capt. Ali (D.W.1), a witness whose evidence appeared to me to be truthful and impartial. This witness had categorically stated that the land transaction was between his wife and the defendant. The witness was careful not to commit himself to one side or the other. This could clearly be seen by his use of such expression like "As far as I know . . . . I received the money but I do not know whether she paid the money from her own pockets or received from someone else." However in the course of his evidence he did say a few pertinent facts which in my opinion would further shift the balance of probability in favour of the defendant. For instance during his cross-examination in-chief he said:

"Nothing was said to me that the property was bought in trust for anybody. As far as I am aware, the defendant's husband, who was buying the land and putting it in the name of his wife. Fatimah is this lady (defendant identified). I was told the monthly instalment would be paid to me through Mustapha. This was because the husband of Fatimah was in Kedah at that time."

It is obvious from these words that the claim about plaintiff paying for the balance of $1,750 of the purchase price was never brought up with Capt. Ali at any time at all and that the balance of the money would be paid 'through' and not 'by' Mustapha.

There are other parts of his testimony which although indirectly spoken had added credence to the defendant's version. Towards the end of his cross-examination in-chief, D.W.1 said:

"I always had to see the Plaintiff because the instalments were not paid. When I did so he told me the money had not arrived. The money was to come from Kedah."

These uncontroverted evidence in my notes go a long way towards showing that instalment had come from the defendant's husband who was at that time in Kedah.

I have considered the whole of the plaintiff's case against that of the defendant and on the balance of probabilities I find that the plaintiff had not succeeded in showing to this Court that the land was purchased by the defendant with the intention of sharing one-third of its interest with the plaintiff.

I would therefore dismiss the plaintiff's claim with costs.

The final matter to be considered is the counterclaim by the defendant in respect of damages for wrongful entry of the private caveat on her land by the plaintiff. I agree that the defendant must have suffered some damages by this act but the appropriate measure of damages was not available to this Court. The evidence in this issue merely indicated the amount which a buyer, Ismail Yassin, was prepared to give for the same land in 1976. There was nothing to show anything else. There could not be wrongful occupation of the land because the original entry of the other brothers were with the consent of the plaintiff and even P.W.5 now remained on the land as a licensee whose licence to stay had not been revoked or terminated by any written or oral notice. I accept that the plaintiff's caveat resulted in a buyer abandoning the proposed sales but other than that, no evidence was introduced to show any diminution of the selling price or any actual loss suffered by the defendant. In *Wallington* v. *Townsend* [1] it was held that, where the plaintiff did not prove damages by way of loss of bargain, he is nevertheless entitled to loss of interest on any deposit paid and cost relating to the preparation of the contract but in our present case the defendant's evidence fell short of disclosing these requirements.

In view of this omission on the part of the defendant to proffer the necessary proof of actual damages I have to dismiss her counterclaim but in doing so I make no order as to costs.

Order accordingly.

Solicitor: *Kadir, Tan & Ramli.*

W v. H

[O.C.J. (Shankar J.) April 17, 1986]

[Johore Bahru – Originating Summon No. 170 of 1986]

Family Law – Custody – Separation deed – Welfare of infant – Civil Law Act, 1956, s. 27 – Courts of Judicature Act, 1964, ss. 23(2) & 24 – R.H.C. 1980, O. 18 r.2 – Guardianship of Infants Act, 1961, ss. 5 & 11 – Law Reform (Marriage and Divorce) Rules 1976, r. 60 – Law Reform (Marriage and Divorce) Act, 1976, ss. 88 – 97.

In this case the parties had a whirlwind courtship as a result of which a child was conceived. After an unsuccessful attempt to abort the child, the parties married. The marriage came under great strain and there was a quarrel in the house of the husband's parents. A separation deed

was drawn and this provided that the wife was not to receive any maintenance and that the sole custody of the child to be born should be given to the husband. After the child was born, the husband took custody of the child. The wife attempted to regain custody of the child and when this failed she applied to the court for its custody.

Held: (1) no infant's rights can be compromised in any document drawn by adults without the prior approval of the court. Parents cannot oust the protection of the court over their children in matters of custody and maintenance. The paramount consideration is always the welfare of the child and there is a rebuttable presumption that it is for the good of a child below the age of 7 years to be with his mother;

(2) the care, custody and control of the infant in this case should remain with the wife.

Cases referred to:

(1) *Scott* v. *Scott* [1913] A.C. 417.
(2) *Re P* (GE) [1965] Ch. 568.
(3) *Re X* (a minor) [1975] 1 All E.R. 697.
(4) *Re D* (a monor) [1976] 1 All E.R. 326.
(5) *Brown* v. *Collins* (1883) 25 Ch. D. 56, 60.
(6) *Kok Yoong Heong* v. *Choong Thean Sang* [1976] 1 M.L.J. 292.
(7) *In re McGrath (infants)* [1893] 1 Ch. 143.
(8) *Re S (an infant)* [1958] 1 All E.R. 783, 786.
(9) *Re B* [1962] 1 All E.R. 872.
(10) *Re C* [1966] 1 All E.R. 838, 844.
(11) *Re O* [1971] 2 All E.R. 744, 746.

ORIGINATING SUMMONS.

S. Balarajah for the applicant.
Ho Thian Cheh for the respondent.

Cur. Adv. Vult.

Shankar J.: W – the applicant wife had a whirlwind courtship in early 1985 with H (the respondent husband). Its result was the conception of the infant I, who is the subject matter of the present application. Pregnancy was medically confirmed in May 1985. After an unsuccessful attempt to abort the child, the parties married on July 6, 1986. Thereafter they cohabited in the house of the husband's parents. After a few months, and in circumstances to be set out in detail hereafter, the marriage came under great strain. The wife returned to her mother's house. Attempts at reconciliation failed. There was a bitter quarrel on January 22, 1986, in the husband's parents' house in which the parties hereto, their parents and other relatives were all participants. It must have seemed to all concerned that the breaking point had been reached. So the assistance of a lawyer's clerk was obtained to put up a separation deed. It provided *inter alia* that the wife was not to receive any maintenance and that sole custody of the child to be born should be given to the husband. And it provided that on the expiration of two years from the date of the marriage, the parties should make a joint application for a divorce. A week later on February 6, 1986, a boy was born. One day later he found himself in the custody of his father. Shortly thereafter, W attempted with the help of her solicitor to regain custody of her new-born baby. He failed. So the present application was filed on February 20, 1986. It has been strenuously contested by H.

Both parties have filed lengthy affidavits. The husband's affidavit is supported by other affidavits from immediate members of his family and a friend. What all these affidavits add up to is that we have here a situation where the husband and wife are both under tremendous emotional strain. What is equally obvious is that the near relatives on either side are equally under stress. Their criticisms of each other are vehement and vociferous.

In this state of affairs, it may be as well if I stated right at the outset that washing dirty linen in public does not make it any cleaner. The identity of the parties should be of no interest to the public except to satisfy the cravings of morbid curiosity. I am firmly of the view that it will not serve the best interest of justice or the parties or the infant to have their names publicised. Consequently I hereby order that the names of the parties in this application and the name of the infant should only be designated by the letters of the alphabet assigned to each of them. I further order that the names of all the witnesses to these proceedings should not be published.

My powers to do so appear to be contained in section 15 of the Courts of Judicature Act 1964 which provides that notwithstanding that the court is deemed to be an open and public court to which the public generally may have access, nevertheless the court has power to hear any matter in camera if it is satisfied that it is expedient in the interest of justice or propriety or for other sufficient reasons so to do, and further that the court may at any time order that no person shall publish the name, address or photograph of any witness involved in the proceedings or any evidence or any other thing likely to lead to the identification of these persons. Contravention of such an order is a criminal offence.

Where infants are involved, it would seem to be the usual practice to have the hearing in camera: See *Scott* v. *Scott*[1] and the commentary to O.33 r.4 of the Rules of the High Court (para

33/4/3 Supreme Court Practice 1985). Account should also be taken here of rule 99 of the Divorce and Matrimonial Proceedings Rules 1980 which precludes the inspection of documents filed in matrimonial proceedings by anyone other than the parties thereto, their solicitors and the Attorney General.

However, although I consider it desirable in the interest of justice that the identities of the parties involved in this case should not be revealed, nevertheless it also seems to me to be in the interests of justice that the facts of this case and the law bearing upon them should be made public knowledge. This judgment is therefore being read out in Open Court.

Whatever may be the position in neighbouring countries, the right of the foetus to be born has clearly been recognised by section 312 of the Penal Code under which provides that whoever voluntarily causes a woman with child to miscarry shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, commit a criminal offence. The section includes the woman who causes herself to miscarry. Legal protection of infants therefore commences in Malaysia from the moment of conception. But once the child is born, there is a whole battery of laws which are ranged in the defence of all children in the realm especially against those whose conduct is adverse to the interest of the infant concerned even if these persons may be the parents themselves.

Section 27 of the Civil Law Act 1956 reads as follows:

"In all cases relating to the custody and control of infants the law to be administered shall be the same as would have been administered in like cases in England as at the date of the coming into force of this Act, regard being had to the religion and customs of the parties concerned, unless other provision is or shall be made by any written law."

Section 23(2) of the Courts of Judicature Act 1964 provides that:

"Without prejudice to the generality of subsection (1), the High Court shall have jurisdiction as was vested in it immediately prior to Malaysia Day and such other jurisdiction as may be vested in it by any written law in force within its local jurisdiction."

Section 24 of the same Act reads:

"Without prejudice to the generality of section 23 the civil jurisdiction of the High Court shall include –

(d) jurisdiction to appoint and control guardian of infants and generally over the person and property of infants: ..."

This jurisdiction has its source in the relationship between the Crown (acting through the courts) and its subjects, who owe allegiance to the Crown and to whom the Crown offers its protection, observing a special obligation as *parens patriae* to minors. All Malaysian minors are wards of court because they are subject to the parental jurisdiction entrusted to the courts.

The English decisions in which the corresponding English concepts are enshrined are: *Re P (GE) (an infant)*[2], *Re X (a minor)*[3], *Re D (a minor)*[4] *and Brown* v. *Collins.*[5]

So it is that Order 18 r.2 of the Rules of the High Court 1980 specifically deprives guardian of the right to compromise or settle proceedings in which infants are involved unless the compromise or settlement is in the interest and for the benefit of the infant. In matrimonial matters rule 60 of the Law Reform (Marriage & Divorce) Rules 1976 (the Rules) requires children to be separately represented in any application for the variation of a settlement unless the Court is satisfied that the proposed variation does not adversely affect the rights or interest of any children concerned and rule 86 is so widely cast that if it appears to the Court that any child ought to be separately represented, in any matrimonial proceedings, the Court may of its own motion, appoint the Official Administrator or some other proper person to be the child's guardian.

The inherent jurisdiction of the Court has been augmented by the Guardianship of Infants Act No. 13 of 1961. Section 5 of that Act reads as follows:

"5. Subject to the provisions of section 10 the father of an infant shall be the guardian of the infant's person and property: provided that a Court or a Judge may make such order as it or he thinks fit regarding the custody of the infant and the right of access thereto of either parent and may vary or discharge such order at any time on the application of either parent.'

Section 11 of the same Act goes on further to say that the court or a Judge in exercising the powers conferred by the foregoing provisions shall have regard primarily to the welfare of the infant and shall, where the infant has a parent or parents, consider the wishes of such parent or both of them, as the case may be.

I would, with respect, adopt that part of the judgment of Arulanandom J. in *Kok Yoong Heong* v. *Choong Thean Sang*[6] on the proper judicial approach in these matters:

"That the paramount consideration shall be the welfare of the child is well settled law and the courts have gone further to state that when considering the 'welfare' referred to in section 11 ...., the court must take the word in its large signification and as meaning that the welfare of the child as a whole must be considered. It is not merely a question of whether the child will be happier in one place than in another but it concerns the general well-being. The welfare of the child both moral and physical should be the paramount consideration in awarding the custody of a child of tender years. See *Satpal Singh an infant.* Further in the case of *Helen Ho Quee Neo* v. *Lim Pui Heng,* the Court of Appeal Singapore held that all relevant factors have to be considered including the conduct of the parties and their character, bearing in mind that the welfare of the child is the first paramount consideration. No hard and fast rules can be laid down based on the sex of the parent or the child as to who should have its care and control and/or custody. In the same case a difference was also made between "custody" and care and control of the child and the Court of Appeal held that "care and control" was only a constituent element of custody and not synonymous of it."

In dealing with this application, this court must of necessity also keep in the forefront of its mind Part VIII of the Law Reform (Marriage & Divorce) Act 1976 (the Act) which is captioned "Protection of Children."

The following sections of that part are especially relevant and are reproduced hereunder.

"88.(1) The court may at any time by order place a child in the custody of his or her father or his or her mother or where there are exceptional circumstances making it undesirable that the child be entrusted to either parent, of any other relative of the child or of any association the objects of which include child welfare or to any other suitable person.

(2) In deciding in whose custody a child should be placed, the paramount consideration shall be the welfare of the child and subject to this the court shall have regard –

(a) to the wishes of the parents of the child; and

(b) to the wishes of the child, where he or she is of an age to express an independent opinion.

(3) There shall be a rebuttable presumption that it is for the good of a child below the age of seven years to be with his or her mother but in deciding whether that presumption applies to the facts of any particular case, the court shall have regard to the undesirability of disturbing the life of a child by changes of custody.

89.(1) An order for custody may be made subject to such conditions as the court may think fit to impose, and subject to such conditions, if any, as may from time to time apply, shall entitle the person given custody to decide all questions relating to the upbringing and education of the child.

(2) Without prejudice to the generality of subsection (1), an order for custody may –

(a) contain conditions as to the place where the child is to reside, as to the manner of his or her education and as to the religion in which he or she is to be brought up;

(b) provide for the child to be temporarily in the care and control of some person other than the person given custody;

(c) provide for the child to visit a parent deprived of custody or any member of the family of a parent who is dead or has been deprived of custody at such times and for such periods as the court may consider reasonable.

(d) give a parent deprived of custody or any member of the family of a parent who is dead or has been deprived of custody the right of access to the child at such times and with such frequency as the court may consider reasonable; or

(e) prohibit the person given custody from taking the child out of Malaysia.

92. Except where an agreement or order of court otherwise provides, it shall be the duty of a parent to maintain or contribute to the maintenance of his or her children, whether they are in his or her custody or the custody of any other person, either by providing them with such accommodation, clothing, food and education as may be reasonable having regard to his or her means and station in life or by paying the cost thereof.

97. The court may at any time and from time to time vary the terms of any agreement relating to the custody or maintenance of a child, whether made before or after the appointed date, notwithstanding any provision to the contrary in any such agreement, where it is satisfied that it is reasonable and for the welfare of the child so to do."

These provisions make it crystal clear that parents cannot oust the protective jurisdiction of the Court over their children in matters of custody and maintenance. The paramount consideration is always the welfare of the child and there is a rebuttable presumption that it is for the good of a child below the age of 7 years to be with his mother.

I now need deal in somewhat greater detail with the history of the relationship between the wife and husband in this case.

When he commenced to court her, H was working in a family business owned by his father. He was earning $1,200 per month, and there is every indication that upon retirement of the father, he would have succeeded to the business. H is the

youngest of the family and dearly beloved of his parents. All of them lived in a double storey terrace house. The house itself appears well appointed and H's family are obviously people of some financial standing. He has an elder brother who is married with two children and his sister is also married with 1 child. All of them appear to get on quite well together.

W on the other hand comes from a more humble background. She lived with her mother and her sister in a single storey link house in a poorer part of town. When their courtship began she was only 22. H was 26. The unwanted pregnancy seems to have earned both of them the displeasure of their respective parents. But if the manner of their mating was more in accord with modern mores, the conduct of their respective parents was entirely in accord with tradition. It must have been obvious to all concerned that here were two young people very much in love with each other.

So the husband's father formally approached the wife's mother for her hand in marriage. This was accepted and a traditional marriage complete with tea ceremony took place on July 6, 1985.

Looking at the affidavits filed by the husband's father and his other relatives, particularly in the matter of the relationship between the wife and her mother-in-law, it is quite apparent that they went out of their way to accommodate her in their house. The spouses of their other two children and their grandchildren did not give them trouble. So the husband's parents may have felt entitled to expect the same degree of accommodation from W.

Things however did not work out in that way. What appears to have been overlooked is that the wife was a girl of 22 who not unnaturally must have harboured visions of enjoying some freedom in the wide world before she settled down to holy matrimony. Her regrets on this account are very evident. The shame of her premature pregnancy must have also put her at a psychological disadvantage with her in-laws even if it is accepted that this was never made a point of express or implied criticism on the part of the husband's parents.

Where the wife's tensions manifested themselves was in her persistence that if the husband really loved her, he should stop working for his father and set up on his own. W also expected of him that he would set up an independent matrimonial home to which both of them could move away.

Her preoccupation on both these points must obviously have increased after she stopped work sometime in August 1985 as a ticketing clerk in a travel agency.

By September 1985 she appears to have convinced H of the necessity of accommodating these demands. He left the family business and went to a town in Perak where he took a job at half the salary he was earning with his father. But she did not follow him there. She went to live with her mother. On December 5, 1985 when H returned to Johore Bahru and asked his wife to follow him to Perak, she refused. He claims that she told him that it was her ambition to go to Kuala Lumpur to do a secretarial course. The idea of being a full-time housewife and mother does not appear to have been very appealing to W at this point in time. Her reaction was one of some disappointment for H who saw no further point in staying on in Perak and he returned in early January 1986 to Johore Bahru.

Here he resumed living with his parents and took up his old job in his father's business. The wife continued to live with her mother. The due date for delivery was only weeks away.

There is a very sharp conflict of evidence as to what actually went wrong from that point onwards. No amount of judicial investigation could ever reveal the whole truth as to what might have gone wrong in a marriage. Nor do I think that such an exercise is profitable especially in a case like this.

Suffice it to say that the wife's complaints are that the husband harrassed her to the point where she was fearful for her safety and the safety of her child and gave her the impression that she was not going to be left alone unless the child was turned over to him.

The husband's allegation is that after he returned to Johore Bahru, she told him that her decision to go to Kuala Lumpur to take up a secretarial course was final, that she was not interested in the baby, and after the baby was born she would give him custody.

By January 22, 1986 he says that she made it plain that she wanted a divorce. Although he

told her not to come to his house that night but the next morning, she insisted and arrived with her sister and mother. There was an almighty row in which the ladies on both sides participated in shouting verbal abuse and after taking her belongings W, her sister and her mother left the husband's house.

After this quarrel, the parties appear to have reconciled themselves that the best thing for them both was a divorce. The following day they went to a lawyer's office where the managing clerk took instructions from both parties and drew up a separation agreement.

This document was ready for execution on January 31, 1986. It was signed by the wife in the presence of her sister. Both of them are fluent in English and W paid $150 by way of costs. The husband arrived for the signing ceremony with his father, and brother-in-law. He too is fluent in English. So neither party can really contend with any force that they did not know what they were signing.

Curiously, however, even though the separation deed provided for it to be attested by the solicitor in whose office the document was prepared, he did not do so. Only his rubber stamp appears on the document. The managing clerk took it upon himself to do the needful. The provisions of the document are what is usually stated in separation deeds. Clauses 4 and 5 are material. They read:

"4. The Husband so long as he is living shall during the life of the Wife not responsible to pay the Wife or to such person or persons as she may from time to time direct in writing for her separate use or for the maintenance and support of herself.

5. The Husband shall be entitled to the sole custody and control of the said child during his lifetime and the Wife shall in no way interfere in his management or education of the said child but liberal access be given to the Wife only to visit the said child."

Another clause in the document provided that the husband shall be solely responsible for maintaining the child and yet another clause required all the wedding jewelleries to be returned to the wife and she was entitled to retain as a separate property all personal chattels and effects in her possession.

Finally, the document provided that the spouses had consented with each other to dissolve the marriage and that a joint petition would be presented to the court after the expiration of the period of two years from the date of the said marriage.

Let it be pointed out straight away that the interest of the parties in this case were diametrically opposed to each other and this was not an appropriate occasion for a solicitor let alone his managing clerk to purport to act for both parties. Section 50 of the Act forbids the presentation of a petition for divorce before the expiration of two years from the date of marriage and section 50(2) only allows such a petition if the case is one of exceptional circumstances or hardship suffered by the petitioner. In determining the application, the Judge is to have regard to the interest of any child of the marriage and to the question whether there is a reasonable probability of a reconciliation between the parties during the specified period.

When the law so provides, it seems to this court to say the least, highly inadvisable for anyone to pre-empt the preventive jurisdiction of the court in this way.

I do not have to decide upon the legal validity of this separation deed in the present case at this point in time. That bridge can be crossed when we get to it.

As to the mental state of the wife when she signed this document, it is not irrelevant to observe, that not only did she not have any independent professional advice, but also that the child was born on February 6, 1986 only a few days later.

In line with her obligations and his rights under the agreement, the husband turned up in the General Hospital the day after the baby was born. Here he collected the child and took it home. She went home to mother to recover from the problems of parturition.

H is not a Japanese. But he is taken with Japanese concepts. In the face of her objection, he gave the child a Japanese name which to some extent appears to symbolise the child's determination to survive the initial attempts to terminate the pregnancy. This is another issue which it is not yet necessary for me to decide *i.e.* whether the name to be given to a newborn child is the sole prerogative of its father.

All the evidence, however, indicates that the husband was a devoted father. He trained himself

to feed the baby and to attend to all its other requirements. One thing he could not do was to breastfeed the child. So it was bottle-fed and medical reports have been tendered in evidence to show that the child is in good health.

Within a month of her discharge from hospital, the mother had an obvious change of heart. She engaged another solicitor to initiate action to recover the custody of the baby. An approach was made to the solicitor whose clerk had drafted the separation deed. On the basis of the information then made known to him, this solicitor called the husband, roundly rebuked him, and procured a promise that the child would be produced the following day (*i.e.* February 19, 1986) and handed over to the wife.

This the husband did not do and the wife's solicitor immediately filed this application for a Court order and served the papers on the husband. The husband went to another solicitor who now acts for him.

The application was heard on the basis of urgency and even though the husband was served with the cause papers before February 24, 1986 all the affidavits upon which he relies were only placed in the court file on the afternoon before the hearing. On the date of hearing, the wife's solicitor had not yet had sight of these papers and could therefore not make any reply to them.

Late service of affidavits in this way is of course to be deprecated. Apart from the other criticisms, one would also add the intolerable strain that it places upon the court. But having read the material, I insisted upon requiring the personal attendance of both the wife and the husband and also the child in Chambers.

Having seen each of them handle their offspring and the manner in which they conducted themselves towards each other, I would state it as my finding that the respondent is a person of remarkable character and that I do not entertain the slightest doubts either of his love for his son or his capacity to take care of the boy if need be.

What I must now deal with is the strenuous submission which his solicitor has addressed to me to ensure that his custody, care and control of the child was not disturbed.

After hearing him out, I immediately decided that immediate interim custody of the child should be given to the mother and directed him to hand the baby over which he did with good grace. I also ordered access on alternate days and maintenance.

I then indicated that I would give very full reasons within two weeks for my decision. Before this could materialise the husband's solicitor indicated his dissatisfaction and required further argument which I have permitted.

I now need to say why I acted as I did. There were two main grounds on which the husband's solicitor rested his case.

The first was that having signed the document the applicant should be held to it. This submission I would brush aside as having no merit whatsoever. No infant's rights can be compromised in any document drawn by adults without the prior approval of the court. Not only is that the position in common law, but section 97 of the Act specifically preserves the power of the court to override any such agreement.

The second submission is that the wife is unfit to have the custody of this newborn baby. But what are the grounds? In point form and putting it at their highest for the husband these are:

(1) That she sought an abortion in the early stages of the pregnancy.

(2) That she showed no love whatsoever for the baby she was carrying whilst she was pregnant but instead was far more pre-occupied with her prospective secretarial career in Kuala Lumpur.

(3) That she expressly disclaimed any inclination towards nursing the baby after he was born.

(4) That she was a willing party to jettisoning the child to fend for itself after it had arrived.

(5) That in addition to the respondent, his mother would also help to look after the baby.

(6) That the respondent's house was a better place for the baby to be brought up.

The reasons why the law in its wisdom insists that *de facto* care, control and custody of children under the age of 7 years should be given to the mother have been dealt with in a number of cases.

Lindley L.J. said in *Re McGrath (infants)*[7] that "the welfare of a child is not to be measured by money only or by physical comfort only. The word 'welfare' must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded.'

In *Re S (an infant)*[8] last paragraph Roxburgh J. said:

"I only say this: The *prima facie* rule (which is now quite clearly settled) is that, other things being equal, children of this tender age should be with their mother and where a court gives the custody of a child at this tender age to the father, it is incumbent on him to make sure that there really are sufficient reasons to exclude the *prima facie* rule.'

He was dealing with a boy of age 3 plus. In *McGrath's* case the 5 children were aged between 16 and 6 and the issue was a religious dispute as to whether the children who were orphans should be brought up in the Catholic or the Protestant faith.

Re B[9] is a case of a boy of 4 whose mother left home. Evershed M.R. said at page 873 that there is no rule of law that a child of tender age should remain with the mother. "Every case must plainly be determined on the particular circumstances affecting that case; though it is of course, true to say that as a matter of human sense a young child is better with his mother and needs a mother's care." Harman L.J. said:

"True it is that the Chancery Judges ... have in past years rather taken the view that so long as a child is young enough to need the day to day care of his or her mother, it is better to leave the child with the mother unless the mother is an entirely unsuitable person."

Donovan L.J. said:

"*Prima facie* a child of this age ought to remain with his mother and strong grounds are required to justify taking it away. I agree that there is no rule of law to that effect but certainly it is the natural law and one that should if possible prevail." (Dissenting judgment).

In *Re C*[10] psychiatric evidence is given on the effect of transferring a child from one home to another.

Re O[11] was an appeal by a mother from a Magistrate's order giving custody of all 3 children aged 7, 5 and 3 to the father. The order was reversed by the Court of Appeal. At page 746a Davies L.J. said:

"It is a strong thing to move little children and especially little girls, and one of these children is a very little girl, from the care of their mother."

"But obviously the care and supervision that a mother, who is not out at work can give to little children is a very important factor in all these custody cases."

I would state it as a categoric opinion of this Court that in such a situation an overwhelming case would have to be shown before a newborn baby should be deprived of the society of its mother. It would be unwise to try and catalogue the circumstances before such an order would be made, but I would venture to suggest that the applicant in such cases would have to come close to proving that the health or welfare of the infant would be put at serious risk if it is left with the mother.

The husband's objections to his wife having the baby with her is not only a very long way from what the law requires, but also seems to display some distortions of viewpoint which could perhaps be attributed to the emotional strain which he and his relatives have had to endure.

When the termination of unwanted pregnancies is common in neighbouring countries which aim for zero population growth and is safely and regularly performed for a small fee, it is perhaps not unnatural for a young unwedded Malaysian mother who has her life in front of her, to consider abortion as a credible alternative. But having decided to go through with the marriage and take up residence with her in-laws, a high degree of sympathetic accommodation would have been required to make life tolerable for the wife in this case who may have had considerable problems in living with herself. Her insistence on compelling the husband to leave a stable financial environment in these days of recession simply does not make sense from any other angle. So both the husband and his parents may well have felt quite properly that the wife was being perverse in her insistence that the husband should abandon a comfortable home and a good job for uncertain fortunes in a far off town to the North. Undoubtedly this would have been compounded by her refusal to accompany him there. And his return to Johore Bahru from her point of view only meant a resumption of the *status quo*.

Despite all this, perhaps there was a need to recognise that the stresses and strains of pregnancy coupled with the terrors of childbirth when they were to be experienced for the first time,

and the regrets and longings for a lost youth, were bound to produce some degree of irrationality on the part of the woman concerned. After all, birth, population and death are human experiences which are personal to holder. It is only after one crosses each threshold that one becomes worldly wise, takes stock, and carries on. Not unnaturally W's attitude changed once I was born since maternity is so pre-eminently the experience which sustains humanity because each birth is a re-assertion of new life, new strength, and new hopes. So even if this court were to act on the basis that every word in the affidavits of the husband and his allies were the gospel truth, I am not prepared to displace the presumptive right of custody which the wife has in this case. Indeed it would have been unnatural for her to behave otherwise.

At the hearing in Chambers, both spouses have told me that despite their disappointments, they still have strong feelings for each other. The infant is their joint flesh and blood and their love for their child is too transparent to need any further emphasis.

It is inevitable that in the circumstances of this case the parents of both spouses got into the act. Whatever they did was done out of a sense of loyalty and love for their progeny and cannot therefore be made the subject of any adverse comment. They too are only human.

But what must now be done is for all considerations of pride, and loss of face, to be set aside and to allow the parties to enlarge the love that each one of them has for the other, to take into account the sensitivities of each other.

I made my first order in Chambers on March 20, 1986. In a careful submission in open court, by way of further argument, on April 16, 1986, Mr. Ho Thian Cheh for the husband has said everything that could possibly be urged in support of the husband's application that the physical custody of the infant should be returned to him.

I am afraid, however, that Mr. Ho has failed to persuade me that the shortcomings of the infant's mother, her relatives, and her environment, are such as to put the health or welfare of the infant at serious risk.

Indeed since the last order was made on March 20, 1986, nothing untoward has happened except for minor differences of opinion between the husband and wife on how the child should be clothed to protect it from inclement weather. This to me is a healthy sign and shows the mutual care and concern of both parties for the infant. There is, however, a complaint that the maintenance I ordered has not been regularly paid.

My order today is that the *de facto* custody, care and control of the infant should remain in W. However, by way of variation of my previous order as to access, I now order that H, the father, shall be permitted to visit I, the infant, daily for 2 hours at W's residence and further order that every Saturday and Sunday he shall be permitted to take the infant to his home for 4 hours each day either from 9am to 1pm or from 4pm to 8pm and W is at liberty to accompany him there if she so chooses. The responsibility for returning the infant I to the wife's residence at 1 pm or 8 pm as the case may be shall be the sole responsibility of the husband.

Except as provided in this judgment, the statutory rights of the father as provided by section 5 of the Guardianship of Infants Act No. 13 of 1961 as the legal guardian of the infant's person and property shall remain unimpaired.

I further order that on or before April 20, 1986, H shall pay to W a further sum of $300 by way of interim maintenance for the infant with liberty to the parties to apply to Court to fix a monthly figure for the continued maintenance of the infant in the event that they are unable to agree to a reasonable amount.

Finally I order that there be general liberty to apply.

There will be no order as to costs.

Order accordingly

Solicitors: *Balarajah & Co.; Ho Thian Cheh & Co.*